80-284

No. 80-

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

AMMONETA SEQUOYAH, ET AL., *Petitioners,*

v.

TENNESSEE VALLEY AUTHORITY, *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTION PRESENTED

1. Whether Cherokee Indian claims that the Tennessee Valley Authority has denied burial to over 1,000 Cherokee bodies solely on the basis of race states a colorable claim under the equal protection guarantee of the Fifth Amendment such that it was erroneous for the Court of Appeals to affirm the dismissal of this case without ever considering the merits of this claim.

## PARTIES TO THE PROCEEDING

The parties to the Court of Appeals proceeding are as follows: The plaintiff-appellants (Petitioners here) are the Eastern Band of Cherokee Indians; the United Ketooah Band of Cherokee Indians; Ammoneta Sequoyah, Richard Crowe, Gilliam Jackson, individually and representing other Cherokee Indians similarly situated. The defendant-appellee (Respondent here) is the Tennessee Valley Authority (hereinafter "TVA").

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AMMONETA SEQUOYAH, et al.,
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vs.

TENNESSEE VALLEY AUTHORITY,
Respondent

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners, Cherokee Tribes and Indians, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on April 15, 1980.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 620 F.2d 1159 (6th Cir. 1980). The opinion of the District Court for the Eastern District of Tennessee is reported at 480 F.Supp. 608 (E.D. Tenn. 1979).

## JURISDICTION

The judgment and opinion of the Court of Appeals were entered on April 15, 1980. A timely petition for

rehearing with suggestion for rehearing en banc was denied on May 29, 1980, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..."

The Fifth Amendment provides that, "No person shall be ... deprived of life, liberty, or property, without due process of law ..."

## STATEMENT OF THE CASE

This case involves a mass removal of interred bodies of dead persons of various races by the Tennessee Valley Authority ("TVA") and its refusal to reinter Indian bodies based solely on race. The Cherokee next of kin alleged that this action discriminates against them on the basis of race or ancestry and violates their religious freedom. The complaint sought, inter alia, the return of Cherokee bodies and reinterment, at TVA expense, with proper regard to Cherokee religious belief and moral sensibilities. The complaint also raised other claims not at issue here. The courts below dismissed the complaint based upon a finding that the other claims failed to state a claim for which relief can be granted but without addressing or considering the merits of the above equal protection claim. The courts below thus completely disposed of the Cherokees' lawsuit without determining whether TVA's refusal to bury innumerable Cherokee Indian

bodies constituted a cognizable claim under the equal protection guarantee of the Fifth Amendment.

The gravamen of the Cherokee petition is that TVA presently has in its possession over 1,000 Indian bodies which were disinterred from the Tellico Dam Project area. While bodies of persons of other races were also disinterred from that area by TVA, these were properly reburied. However, despite requests from Cherokee relatives of the disinterred, TVA has refused to bury the Cherokee bodies in its possession.

In TVA v. Hill, 437 U.S. 153 (1978), this Court permanently enjoined the TVA from completing the Tellico Dam Project on the ground that the project would violate the Endangered Species Act, 16 U.S.C. §§ 1531 et seq. However, on September 25, 1979, the project was exempted from the Endangered Species Act and TVA was directed to complete the project by a provision of the Energy and Water Development Appropriations Act, Pub. Law. No. 96-69.

Petitioners commenced this action on October 12, 1979, by filing suit in the United States District Court for the Eastern District of Tennessee, seeking declaratory and injunctive relief against the Tennessee Valley Authority (TVA).[1/] The complaint alleged that TVA engaged in racial discrimination against the Cherokees in its Tellico Dam Project by disinterring Cherokee bodies from

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1/ District Court jurisdiction was invoked under 28 U.S.C. §§ 1331(a), 1343(3), 1362; 42 U.S.C. § 1996; and 16 U.S.C. § 470. Declaratory relief was sought under 28 U.S.C. §§ 2201 and 2202.

the project area and retaining them, in contrast to its treatment of bodies of non-Indians. The complaint further alleged that the innundation of the Little Tennessee Valley caused by the proposed project would destroy areas held sacred in the religion of the Cherokee Tribe in violation of constitutional and statutory rights.[2/] The Cherokees sought a declaration that TVA had violated their constitutional rights and an order requiring TVA to rebury Cherokee bodies.

On November 2, 1979, after oral argument, the District Court granted TVA's motion to dismiss this action under Rule 12(b)(6), Federal Rules of Civil Procedure, holding that since the Cherokees did not allege a property interest in the lands in question, they failed to state a claim under the Free Exercise Clause of the First Amendment (480 F.Supp. 608, 612). Although the District Court opinion discussed some of the other claims raised by the complaint, there was no discussion of the Cherokee bodies appropriated by TVA, and the only reference made to an equal protection claim referred to the Cherokees' Fourth Claim which alleged that the Energy and Water Development Appropriations Act, supra, violates plaintiffs' rights to the equal protection of the laws. (480 F.Supp. at 612.)

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2/ This issue is not being raised here. The Cherokees are not seeking a review of those aspects of the case dismissed below which would require the halting of the Tellico Dam Project. Indeed, that project has been completed for some time.

The District Court's omission is inexplicable because the question of the Indian bodies was clearly and separately alleged in the complaint as a separate claim[3/] and reiterated by the Cherokees in their brief opposing TVA's motion to dismiss.[4/] Moreover, the affidavits accompanying

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3/ In their Fifth Claim, Cherokees alleged that,

> [t]he actions of Defendant in unearthing, excavation, plowing, disturbing, removing, and appropriating the remains of the ancestors and relatives of plaintiffs, together with their burial possessions and offerings, violates the rights secured for the plaintiffs by the First, Fifth, and Ninth Amendments of the United States Constitution, ...

(Complaint, pp. 8-9.) Paragraph 28 of the Complaint requested:

> an order directing Defendant, its agents, employees, servants, and contractors, having possession of bodies, remains and burial possessions of the previous Indian occupants of the Little Tennessee River Valley, to be returned to their resting places with all dignity and reverence, in accordance with applicable law, at the expense of the Defendant!

(Complaint, pp. 9-10.) And in Paragraph 4 of the Prayer for Relief, the Cherokees requested:

> an order requiring the Defendant to return the bodies, remains and burial objects of the deceased Cherokee and Indian people, to their resting places at the expense of the Defendant.

(Complaint, p. 10.)

4/ PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, October 25, 1979, page 2.

the complaint show that several of the Cherokee affiants have direct ancestors buried in the area where TVA exhumed the bodies;[5] and that hundreds of these burials have been removed and retained by TVA.[6]

On November 9, 1979, the Court of Appeals denied the Cherokees' motion for injunction pending appeal, which was also denied on that same date by Justice Stewart.[7]

On April 15, the Court of Appeals affirmed the dismissal by the District Court, but on different grounds with one Judge dissenting. The majority held that the Cherokees failed to sustain their burden of proof necessary to make out a cognizable claim under the Free Exercise Clause. In so holding, the Court of Appeals treated the District Court's dismissal as one granting summary judgment and reviewed affidavits and other evidence outside the pleadings. In his dissenting opinion, Judge Merritt was of the view that the case should be remanded to permit the Cherokees to offer proof on their First Amendment claim.

However, the Court of Appeals also ignored the Fifth Claim in an opinion which merely agreed with the holding

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5/ See Affidavits of Robert Blankenship, page 1; Johnny Kanott, page 1; Bailey Coleman, page 1; Mary Ross, page 1; Gerard Parker, page 1; Emmaline Diwer, page 1; Shirley Jackson, page 1; Roy French, page 1; Going Back Chiltoskey, page 1, Willie Walkingstick, pages 1-2.

6/ Affidavit of Duane King, page 9.

7/ On November 12, Justice Brennan also denied the same request.

of the District Court (620 F.2d at 1161), even though this claim was specifically pointed out to the Court of Appeals in brief:

> There remains a "live" controversy with respect to the disposition of the bodies removed and not yet reinterred ... There also remains an unsettled dispute over whether TVA is entitled to retain possession of the bodies and remains removed from the Cherokee Village sites. The Cherokees sought injunctive relief for the return of these bodies [see, paragraph 3, Prayer for Relief] and sought a declaration that TVA has not complied with the Tennessee Grave Statute and that TVA's removal of these graves, in contrast to the treatment of non-Indian graves, is discriminatory. The District Court completely ignored the issue of these graves ...

(Appellant's Reply Brief, p. 8.) In their petition for rehearing, the Cherokee specifically repeated this omission and asked the Court of Appeals to consider the claim.[8/]

In this petition, the Cherokees seek a review and reversal of the Court of Appeal's dismissal of this action only as it relates to the claim concerning Cherokee bodies.

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8/ See PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC UNDER RULES 36(B) and 40, April 28, 1980, pages 13-15, section entitled, "The Panel Overlooked or Ignored the Separate Equal Protection Issues Raised in the Complaint Concerning TVA's Disinterment and Detention of over 1,000 Cherokee Bodies."

## REASONS FOR GRANTING THE WRIT

This case is of major significance for the following reasons:

The federal government has a paramount interest to see that burials of all dead persons disinterred from federal lands are properly carried out and in a racially equal manner. This case presents a factual situation which questions basic notions of civilized decency. In the Court of Appeals, TVA admitted it has disinterred and retained 1,140 Indian bodies from the Tellico Project area.[9/] These are relatives of petitioners. While the bodies of white Americans were also disinterred, they were immediately reburied with due respect. In stark contrast, the Cherokees' relatives are being stored in sacks and boxes despite requests for equal racial treatment.

Where a federal agency is permitted to unearth and retain over 1,000 Indian bodies, in the face of claims by relatives of racial discrimination, it is important to subject that conduct to close judicial scrutiny and to determine whether the Constitution affords protections in this sensitive area important to all persons.

In Rice v. Sioux City Cemetery, 349 U.S. 70 (1955), a cemetery refused to bury a Winnebago Indian relying upon a burial contract clause which accorded burial privileges only to members of the Caucasian race. The

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9/ Page 6, MEMORANDUM OF DEFENDANT-APPELLEE IN OPPOSITION TO MOTION OF PLAINTIFF-APPELLANTS FOR INJUNCTION PENDING APPEAL, December 11, 1979.

plaintiff claimed that the recognition of this racial restrictive covenant by the Iowa courts violated the Fourteenth Amendment. This Court granted certiorari in that case, "because at least four members of the Court deemed that despite the rather unique circumstances of this case Iowa's willingness to enforce this restrictive covenant rendered it 'special and important.'" (Id. at 74.)[10/] This case involves the refusal of a federal agency to bury not one, but innumerable Cherokee Indians and a refusal by the courts below to pass on the merits of a cognizable equal protection claim.

This case raises important questions of public policy in an extremely sensitive area where there is a paucity of federal case law. At stake here are the deeply-rooted notions of respect for the dead, and whether this value also applies to Native Americans. Historically, the interred remains of Native Americans have not been accorded the same reverence as those of white Americans. Indian bodies have been deemed significant only as the exclusive preserve of archeologists, museums and collectors, irregardless of the sentiment of affected Indian people. As such, the remains of Native Americans have been subjected to public display, mutilation, and other treatment which, if applied to white Americans, would bring immediate cries of public

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10/ On rehearing the Court dismissed the writ of certiorari as improvidently granted, because of the passage of a new state law banning such restrictive covenants.

outrage.[11/] There is no reason to believe this treatment

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11/ Section 2 of the American Indian Religious Freedom Act, 42 U.S.C. 1996, required the President to conduct a year-long evaluation of federal policies which interfere with traditional Indian religious freedom and to report his findings to Congress. In the report that was submitted under Section 2, the administration included a section entitled "Land-Cemeteries," which states, in pertinent part:

> The prevalent view of the society of applicable disciplines is that Native American human remains are public property and artifacts for study, display and cultural investment. It is understandable that this view is in conflict with and repugnant to those Native people whose ancestors and near relatives are considered the property at issue.
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> * * *
>
> The disturbance of Native American burial sites on federal lands may be purposeful or inadvertent. Purposeful disturbances include authorized archeological and educational use of the site, as well as illegal abuse, pillage and vandalism of the site. Inadvertent displacements usually occur when federal roads, dams or other construction projects proceed in the absence of adequate site surveys and without consulting the affected Native Americans.

AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT, P.L. 95-341, Federal Agencies Task Force, Chairman, Cecil D. Andrus, Secretary of the Interior, August, 1979, page 64. In Appendix C, Cemeteries (1)-(4), the report lists 67 separate burial desecration problems faced by 29 tribes, Indians, and Native Hawaiians in 17 states that were identified by the Administration during 1979.

on a national basis will abate, unless this Court acts to subject it to judicial scrutiny.

It is erroneous for the lower courts to refuse to consider the Fifth Claim and to dismiss the entire action based solely upon rulings on other separate causes of action.

In recent years this Court has clearly set forth the elements necessary to establish a claim based upon a denial of equal protection of the laws. See, Arlington Heights v. Metro. Housing Corp., 429 U.S. 252, 266-268 (1977); Washington v. Davis, 426 U.S. 229, 238-242 (1976). The complaint and record herein show that TVA's refusal to bury Cherokee bodies is based on race, that this facially disparate racial treatment has resulted in harm to the Cherokees, and that petitioners should be entitled to adduce proof at trial showing that TVA's action is racially motivated under the criteria of Arlington Heights v. Metro. Housing Corp., supra.

The Equal Protection Clause of the Fourteenth Amendment is applicable to the federal government through the medium of the Fifth Amendment; and the courts' approach to Fifth Amendment equal protection claims is the same as equal protection claims under the Fourteenth Amendment. Weinberger v. Wiesenfeld, 420 U.S. 636, 638, fn. 2 (1975); Jimenez v. Weinberger, 417 U.S. 628 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1974); Bolling v. Sharpe, 347 U.S. 497 (1954).

If, at trial, the Cherokees are able to sustain their allegations of disparate racial treatment by TVA, and show it to be based upon racial motives, they will

have established a prima facie case under Washington v. Davis, supra at 241. Upon a finding of racial discrimination, it is clear that appropriate declaratory and injunctive relief may be granted. This issue has not been mooted by the completion of the Tellico Dam Project, and it is well recognized that a court of equity has wide discretion to order the proper burial of bodies which have been disinterred and to remedy deprivations of constitutionally protected rights. Beatty v. Kurtz, 2 Pet. 566, 584-585 (1829); Female U. Band Ass'n v. Unknown Heirs at Law, Etc., 403 F.Supp. 540 (D.C. D.C. 1975), aff'd, 564 F.2d 600 (D.C.Cir. 1977); United States v. Unknown Heirs, 152 F.Supp. 452 (W.D.Okla. 1957).

Because the courts below failed to address or consider a valid separate cause of action, it was error to enter judgment dismissing the entire action. If one of the counts of a complaint is sufficient, while others are not, it is fundamental that the entire action should not be dismissed. Eye Encounter, Inc. v. Contour Art, Ltd., 81 F.R.D. 683, 689 (E.D.N.Y. 1979); Bleecker v. Drury, 3 F.R.D. 325, 327 (W.D.N.Y. 1944). See also, Gross v. Kennedy, 183 F.Supp. 750, 756 (S.D.N.Y. 1960). The departure of the Court of Appeals from this rule calls for an exercise of this Court's power of supervision.

## CONCLUSION

The Writ of Certiorari raises a clear error on an issue of important concern to Indian people. As such, it should be granted.

Respectfully submitted,

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Appendix A

No. 79-1633

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

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| AMMONETA SEQUOYAH, RICHARD CROWE, GILLIAM JACKSON, Individually and representing other Cherokee Indians similarly situated; the EASTERN BAND OF CHEROKEE INDIANS; and the UNITED KETOOAH BAND OF CHEROKEE INDIANS, Appellants, v. TENNESSEE VALLEY AUTHORITY, Appellee. | APPEAL from the United States District Court for the Eastern District of Tennessee, Northern Division. |

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Decided and Filed April 15, 1980

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Before: LIVELY, KEITH and MERRITT, Circuit Judges.

LIVELY, Circuit Judge. This appeal requires the court to make a determination of the legal efficacy of a claim based on the Free Exercise Clause of the First Amendment.[1]

I.

The plaintiffs brought this class action on behalf of "all those present or future Cherokee Indians who practice the traditional Cherokee religion and adhere to Cherokee

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1 "Congress shall make no law respecting an establishment or religion, or prohibiting the free exercise thereof;...."

Indian tradition and culture." The principal relief sought in the complaint was an injunction to prevent completion and flooding of the Tellico Dam on the Little Tennessee River in Monroe County, Tennessee. The complaint alleged that the impoundment created by the dam will cause irreparable injury to the plaintiffs. This injury will be caused by the flooding of the "sacred homeland" of the plaintiffs along the river, which will result in destruction of "sacred sites, medicine gathering sites, holy places and cemetaries, [and] will disturb the sacred balance of the land...." It was further stated that the threatened actions of the defendant would cause "irreversible loss to the culture and history of the plaintiffs."

The claim of a constitutional violation based on the Free Exercise Clause was stated as follows:

> ...the individual named Plaintiffs will suffer injury by the infringement of their right to worship the religion of their choice in the manner of their choosing by the destruction of sites which they hold in reverence and in denial of access to such sites by the Defendant. This injury will also be suffered by other members of the class which these individual Plaintiffs represent.

The complaint also contained claims based upon other provisions of the First Amendment, the Fifth and Ninth Amendments, the American Indian Religious Freedom Act, 42 U.S.C. § 1996, the National Historic Preservation Act, 16 U.S.C. § 470 et seq. and various laws of the State of Tennessee.

The plaintiffs filed some 25 affidavits with the complaint in support of their motion for a preliminary injunction. The defendant filed a motion to dismiss for failure to state a claim, pursuant to Rule 12(b)(6), Fed. R. Civ. P., to-

gether with an alternative motion for summary judgment pursuant to Rule 56. This motion was accompanied by three affidavits. In a brief in support of its motion for summary judgment, the defendant asserted that the plaintiffs were estopped to make their claim and were barred by laches. In their response, the plaintiffs argued that there were genuine issues of material fact, particularly with respect to the defense of laches, and that this was not a proper case for summary judgment.

All issues were fully briefed and the district court heard extensive oral arguments. Thereafter the court filed a memorandum opinion and entered an order denying the plaintiffs' motion for injunction and granting the defendant's motion to dismiss. In its memorandum, the district court concentrated on the religious freedom arguments and quickly disposed of the other constitutional claims and those based on statutes. At the outset the district court states, "The Court assumes that the land to be flooded is considered sacred to the Cherokee religion and that active practitioners of that religion would want to make pilgrimages to this land as a precept of their religion." The court found that the only "coercive effect" of the impoundment on the plaintiffs' religious beliefs or practices would consist of preventing access to certain land owned by the government. The district court then held, "the free exercise clause is not a license in itself to enter property, government-owned or otherwise, to which religious practitioners have no other legal right or access." The court stated specifically that it did not reach the defenses of estoppel and laches. Sequoyah v. TVA, 480 F.Supp. 608 (E.D. Tenn. 1979).

II.

Though the district court granted the motion to dismiss, it is clear from the transcript and from his memorandum that Judge Taylor considered the various affidavits which were in the record. Under Rule 12(b) when matters outside the pleadings are presented to the court, and not excluded, a motion to dismiss for failure to state a claim is treated as one for summary judgment. We treat the decision of the district court as one granting summary judgment. See Compania De Remorque Y. Salvamento, S.A. v. Esperance, Inc., 187 F.2d 114 (2d Cir. 1951). In reviewing summary judgment for the defendant this court must view the entire record in the light most favorable to the plaintiffs. Aetna Insurance Co. v. Loveland Gas & Electric Co., 369 F.2d 648 (6th Cir. 1966); Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425 (6th Cir. 1962).

A.

We agree with the holding of the district court that the defendant was entitled to judgment on the plaintiffs' claim of violation of their right to freedom of speech and association, to due process and equal protection of the law, and rights reserved to them by the Ninth Amendment. Accepting all the pleadings and affidavits as true, no claim for relief was stated with respect to these theories and the defendant was entitled to judgment as a matter of law. Relief under the American Indian Religious Freedom Act, the National Historic Preservation Act and laws of Tennessee is foreclosed by a provision of the Energy and Water Development Appropriation Bill, Pub. Law No. 96-69, signed by President Carter on September 25, 1979: "[N]otwithstanding

provisions of 16 U.S.C., Chapter 35 [The Endangered Species Act] or any other law, the Corporation [TVA] is authorized and directed to complete construction, operate and maintain the Tellico Dam... " [italics supplied]. No clearer congressional command is imaginable. No law is to stand in the way of the completion and operation of the dam. The only basis upon which the district court or this court would be empowered to enter an order contrary to the express will of Congress is that a violation of the Constitution will result from carrying out the congressional mandate.

B.

Before analyzing the complaint and affidavits of the plaintiffs we note that the Tellico Dam has engendered controversy and litigation from the time it was first proposed. A brief description of the Little Tennessee River, the historical significance of the region and the litigation spawned by Tellico is contained in the opening paragraphs of the Supreme Court's opinion in the "snail darter" case, TVA v. Hill, 437 U.S. 153, 156-59 (1978).

The record in the present case discloses that some of the plaintiffs objected to the dam and sought to prevent its construction as early as 1965. However, the documents in the record indicate that the Cherokee objections to the Tellico Dam were based primarily on a fear that their cultural heritage, rather than their religious rights, would be affected by flooding the Little Tennessee Valley. Only with the filing of the complaint in this action, on October 12, 1979 - less than a month before impoundment was scheduled to begin - did any Cherokee make an explicit claim based on the Free Exercise Clause.

C.

The allegations of the complaint which relate to free exercise of religion have been set forth, ante. Examination of the contents of the affidavits filed by the plaintiffs discloses the following:

> (1) The plaintiff Ammoneta Sequoyah is a medicine mand and a direct descendant of Sequoyah, the inventor of the Cherokee writing system. This affiant stated that he had gone to the Valley all his life and had lived in an abandoned cabin at Chota* for six years. His ancestor Sequoyah was born at Tuskegee, another of the Cherokee village sites in the Valley. The affiant stated that he goes to the Valley three or four times a year to get medicine which must be gathered by a medicine man "to work a cure." The Cherokees believe that all a person knows is placed in the ground with that person when he is buried. Flooding the Valley or digging up the bodies of Indians buried there will destroy "the knowledge and beliefs of [the] people who are in the ground" and destroy what they have taught. Mr. Sequoyah believes he will lose his knowledge of medicine if the Valley is flooded.
>
> (2) Richard Crowe had been going to the lands at Tellico for more than 30 years and learned from his people that "This is where WE begun." Over the years Mr. Crowe has visited the area more than 20 times, and he took his children there when they were young. Chota is one of the sacred Cherokee places, spoken of by this family as the birthplace of the Cherokee. It was understood by the Cherokees that "this location was our connection with the Great Spirit."

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*Chota was one of the nine sites of 18th Century Cherokee villages located in the Valley. Chota was perhaps the most important of these; it was both the capital of the Cherokee Nation and a "peace town" or sanctuary.

(3) Lloyd Sequoyah, brother of the plaintiff Ammoneta Sequoyah, is also a medicine man. He stated in his affidavit that he had visited the Valley "on two occasions," and that the only place that he can find his medicine is where the Cherokee forefathers lived. It was his belief that "If these lands are flooded they will destroy the spiritual strength of the Cherokee people."

(4) Robert Blankenship stated, "Chota, and the Little Tennessee River ... are sacred because they are the only two tangible items left for me and other Cherokee people to worship."

(5) A number of other affidavits described the land in the Little Tennessee Valley as sacred and holy to Cherokees and stated that burial sites should not be disturbed.

(6) Several affidavits were filed by anthropologists who specialize in American Indian studies. These affidavits affirmed the importance of particular places in Cherokee tradition and religion. They also testified to the importance of living in harmony with nature and the belief that interference with natural objects, such as damming rivers, is wrong. All also testified to the importance of prophecies to traditional Cherokees, and stated that many of their prophecies rest on oral history of earlier events in the "Old Country" of North Carolina, Georgia and Tennessee.

D.

The Cherokees who are plaintiffs in this action obviously have great reverance for their ancestors and believe that the places where their ancestors lived, gathered medicines, died and were buried have cultural and religious significance. Similar feelings are shared by most people to a greater or lesser extent. However, because of their beliefs respecting the transmission of knowledge and spiritual powers to succeeding generations, particular geographic locations figure more prominently in Indian religion and culture than in those of most other people.

III.

There is no requirement that a religion meet any organizational or doctrinal test in order to qualify for First Amendment protection. Orthodoxy is not an issue. The fact that Cherokees have no written creeds and no man-made houses of worship is of no importance. The Cherokees have a religion within the meaning of the Constitution and the sincerity of the adherence of individual plaintiffs to that religion is not questioned. However, in bringing this action, the plaintiffs are asserting that otherwise lawful and wholly secular activity of the government should be prohibited. Accepting every statement of fact as true, the question is whether the plaintiffs have shown a constitutionally cognizable infringement of a First Amendment right.

It is the flooding of a particular place which is claimed to deny the right freely to exercise the plaintiff' religion. It is clear, even from the plaintiffs' affidavits, that the exact location of Chota and the other village sites was unknown to the Cherokees until TVA undertook archeological explorations with the assistance of the University of Tennessee. It appears that the plaintiffs are now claiming that the entire Valley is sacred. Yet none of the affidavits stated this explicitly. For more than 100 years prior to its acquisition by TVA the land in the Valley was owned by persons other than the plaintiffs or members of the class. There is no showing that any Cherokees other than Ammoneta Sequoyah and Richard Crowe ever went to the area for religious purposes during that time. At most, plaintiffs showed that a few Cherokees had made expeditions to the area, prompted for the most part by an understandable desire to learn more about their cultural heritage.

IV.

Two recent Supreme Court cases establish a two-step analysis in which courts should engage when deciding a Free Exercise claim. First, it must be determined whether the governmental action does in fact create a burden on the exercise of the plaintiffs' religion. If a burden is found it must be balanced against the governmental interest, with the government being required to show an overriding or compelling reason for its action. See Sherbert v. Verner, 374 U.S. 398, 402-03 (1963); Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972). The first step in this analysis is described in Yoder as evaluating the "quality of the claims" alleged to be religious. 406 U.S. at 215.

Many of the reported decisions concerning Indian religious claims offer little help because they arose in entirely different factual contexts from that of the present case.[2] In the one reported case which is similar to the present one, individual Navajo Indians and three Navajo "Chapters" claimed that the waters of Lake Powell encroached upon their ancestral worship site within the Rainbow Bridge National Monument in Utah. The district court granted summary judgment for the government defendants on two grounds: (1) the fact that the plaintiffs had no property interest in the Monument was held to deprive them of a cognizable First Amendment claim; (2) if the plaintiffs were found to have

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2 Typically they concern some official regulation of individual activity which infringes the right of a particular group or person to the free exercise of religion. E.g., Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975) (prison regulation against long, braided hair).

a cognizable claim, when the opposing interests were balanced those of the defendants were found to outweigh those of the plaintiffs. Badoni v. Higginson, 455 F.Supp. 641 (D.C. Utah 1977), appeal pending, No. 78-1517 (10th Cir.)

The district court in the present case based its holding on the plaintiffs' lack of any property interest in the Tellico area. 480 F.Supp. at 612. While this is a factor to be considered, we feel it should not be conclusive in view of the history of the Cherokee expulsion from Southern Appalachia followed by the "Trail of Tears" to Oklahoma and the unique nature of the plaintiffs' religion. Nevertheless, there are criteria by which the constitutional validity of a claim based on the Free Exercise Clause must be tested. In Wisconsin v. Yoder, supra, the Supreme Court found that the religious faith and the mode of life of the Amish are "inseparable and interdependent," and that "the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." 406 U.S. at 215-16. In Frank v. Alaska, ___ P.3d ___ (No. 3689, Dec. 21, 1979), the Supreme Court of Alaska reversed the conviction of an Athabascan Indian who had been found guilty of violating game laws when he killed a moose for a funeral feast, or potlatch. The court found that "[t]he funeral potlatch is the most important institution in Athabascan life" and that "[f]ood is the cornerstone of the ritual." Slip opinion at 9. "While moose itself is not sacred, it is needed for proper observance of a sacred ritual which must take place soon after death occurs.

Moose is the centerpiece of the most important ritual in Athabascan life and is the equivalent of sacred symbols in other religions." Id. at 13 (footnotes deleted). In People v. Woody, 40 Cal. Rptr. 69, 394 P.2d 813 (1964), the hallucinogenic drug peyote was found to play a central role in the ceremony and practice of the Native American Church, an organization of American Indians. The "meeting" ceremony, involving the use of peyote, was found to comprise the cornerstone of the religion. Peyote was found to be more than a sacrament; it was itself an object of worship. "[P]rohibition of the use of peyote results in a virtual inhibition of the practice of defendants' religion. To forbid the use of peyote is to remove the theological heart of Peyotism." 394 P.2d at 817-18.

Examination of the plaintiffs' affidavits discloses no such claim of centrality or indispensability of the Little Tennessee Valley to Cherokee religious observances. Granting as we do that the individual plaintiffs sincerely adhere to a religion which honors ancestors and draws its spiritual strength from feelings of kinship with nature, they have fallen short of demonstrating that worship at the particular geographic location in question is inseparable from they way of life (Yoder), the cornerstone of their religious observance (Frank), or plays the central role in their religious ceremonies and practices (Woody). Rather, the affidavits disclose that medicines are obtainable there which may be found at higher elevations in other locations, that it is believed by some that the knowledge of previous generations will be lost if graves are disturbed or flooded and that the locations of Chota and other village sites are sacred

places. These affidavits appear to demonstrate "personal preference" rather than convictions "shared by an organized group." Yoder, supra, 406 U.S. at 216. When the affidavits are "indulgently treated," Bohn Aluminum & Brass Corp. v. Storm King Corp., supra, 303 F.2d at 427, at most they establish a feeling by the individual affiants that the general location of the dam and impoundment has a religious significance which will be destroyed by the flooding. The claim of centrality of the Valley to the practice of the traditional Cherokee religion, as required by Yoder, Woody and Frank, is missing from this case. The overwhelming concern of the affiants appears to be related to the historical beginnings of the Cherokees and their cultural development. It is damage to tribal and family folklore and traditions, more than particular religious observances, which appears to be at stake. The complaint asserts an "irreversible loss to the culture and history of the plaintiffs." Though cultural history and tradition are vitally important to any group of people, these are not interests protected by the Free Exercise Clause of the First Amendment.

It is a difficult and sensitive determination. However, we have looked at "the quality of the claims," as required by Yoder, supra, 406 U.S. at 215, and conclude that plaintiffs have not alleged infringement of a constitutionally cognizable First Amendment right. In the absence of such an infringement, there is no need to balance the opposing interest of the parties or to determine whether the government's interest in proceeding with its plans for the Tellico Dam is "compelling."

V.

The plaintiffs have urged this court to remand to the district court for a trial. However, at the hearing on the motions the district court particularly asked what issues would require a trial, given the affidavits filed by the parties. Counsel for the plaintiffs emphasized the need for further proof in order for the district court to pass on the defense of laches and estoppel and in balancing the competing claims, assuming a finding of infringement. Neither the district court nor this court found it necessary to reach these issues. No argument was made that further proof was required to establish the required quality of the claims. When asked at oral argument in this court, counsel for the plaintiffs was unable to state what further proof was required. It is our conclusion, for the reasons set forth, that the defendant was entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. Nor is it necessary to remand because we have decided the case for reasons somewhat different from those stated by the district court. The grounds of our decision are supported by the record and the parties have fully briefed and argued these grounds. See Paskaly v. Seale, 506 F.2d 1209 (9th Cir. 1974)

The judgment of the district court is affirmed. No costs allowed on appeal.

MERRITT, Circuit Judge, dissenting. I agree with the centrality standard and the general reasoning of the Court's opinion, but I believe the case should be remanded to the District Court to permit plaintiffs to offer proof concerning the centrality of their ancestral burial grounds to their religion.

This is a confusing and essentially uncharted area of law under the free exercise clause. At the time the complaint and various affidavits were filed, the centrality standard had not been clearly articulated. It may have been unclear to the Cherokees precisely what they had to allege and prove in order to make a constitutional claim. Indeed, the District Court simply held that the Indians have no free exercise claim because the Government now owns the land on which the burial sites are located. The District Court therefore did not explore, develop or find any facts concerning the role that this particular location plays in the Cherokee religion. In view of the liberal rules of pleading and the protective attitude that federal courts should follow in considering Indian claims,[1] we should reverse and remand the case to the District Court in order to give the Cherokees an opportunity to offer proof concerning the significance and centrality of their ancestral burial grounds in light of the standard we have adopted.

1 See, e.g., United States v. Jackson, 280 U.S. 183, 190 (1930); United States v. Nice, 241 U.S. 591, 597 (1916); United States v. Kagama, 118 U.S. 375, 384 (1886).

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 79-1633

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AMMONETA SEQUOYAH, RICHARD CROWE, GILLIAM JACKSON, Individually and representing other Cherokee Indians similarly situated; the EASTERN BAND OF CHEROKEE INDIANS, and the UNITED KETOOAH BAND OF CHEROKEE INDIANS, Appellants,

v.

TENNESSEE VALLEY AUTHORITY, Appellee.

Before: LIVELY, KEITH and MERRITT, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs allowed on appeal.

ENTERED BY ORDER OF THE COURT.

(signed) Clerk

Issued as Mandate: June 17, 1980

Appendix C

No. 79-1633

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Filed
May 29, 1980
John P. Hehman, Clerk

AMMONETA SEQUOYAH, RICHARD CROWE, GILLIAM JACKSON, Individually and representing other Cherokee Indians similarly situated; the EASTERN BAND OF CHEROKEE INDIANS; and the UNITED KETOOAH BAND OF CHEROKEE INDIANS,

Appellants

ORDER

v.

TENNESSEE VALLEY AUTHORITY

Appellee

/

BEFORE: LIVELY, KEITH and MERRITT, Circuit Judges.

No judge in active service on the court having requested consideration en banc, the petition for rehearing filed herein by the appellants has been referred to the panel which heard the appeal. Upon consideration the court concludes that the petition for rehearing presents no issues which were not fully considered by the court upon the original submission and decision of the case.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

(signed) Clerk

Appendix D

Ammoneta SEQUOYAH, Richard Crowe, Gilliam Jackson, Individually and Representing Other Cherokees similarly situated, and the Eastern Band of Cherokee Indians, and The United Ketooah Band of Cherokee Indians

v.

TENNESSEE VALLEY AUTHORITY

Civ. No. 3-79-418

United States District Court

E. D. Tennessee, N. D.

Nov. 2, 1979.

MEMORANDUM

ROBERT L. TAYLOR, District Judge.

This is an action seeking injunctive relief against impoundment of the Tellico Reservoir on the Little Tennessee River. The ground for such relief is that the flooding of the Little Tennessee will violate plaintiffs' constitutional and statutory rights to freely exercise their religion. Before the Court are plaintiffs' motion for a preliminary injunction and defendant's motion to dismiss the complaint for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). Both motions have been exhaustively briefed and argued orally before this Court.

1. FACTS

In 1966, Congress appropriated the first construction funds for the Tellico Dam and Reservoir project. Since then over $111,000,000 have been spent on the project which is now near completion. A fruitful source of litigation, the

dam has been the subject of at least nine lawsuits on the district court level alone. This, the latest one, was filed on the eve of its completion, even though the plaintiffs have known about the project and its attendant First Amendment issues since 1965. Although enjoined twice by the courts, the project has been free from any injunction for at least nine of the last fourteen years. It is difficult to understand why plaintiffs have waited until now to raise their constitutional arguments in court.

In 1967, the Tennessee Valley Authority began acquiring privately owned property along the Little Tennessee River as the initial step in its project to impound a reservoir there. The latest lawsuit against the dam, before this one, resulted in a permanent injunction against impoundment of the reservoir based on the Endangered Species Act, 16 U.S.C. Chapter 35, Sec. 1531 et seq. See TVA v. Hill, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). On September 24, 1979, the President signed into law the Energy and Water Development Appropriation Bill, providing, in relevant part, as follows:

> [N]otwithstanding provisions of 16 U.S.C., Chapter 35 or any other law, the Corporation is authorized and directed to complete construction, operate, and maintain the Tellico Dam and Reservoir Project for navigation, flood control, electric power generation, and other purposes, including the maintenance of a normal summer reservoir pool of 813 feet above sea level.

Since that time, TVA has been working toward completion of the dam and impoundment of the reservoir. Although no specific date has yet been set for closing the gates of the dam to begin impoundment, such action is imminent, to occur sometime after November 9, 1979.

The plaintiffs in this lawsuit are two bands of the Cherokee Indian nation and three individual Cherokee Indians. Plaintiffs claim that the land along the Little Tennessee River which will be flooded by the Tellico Reservoir is sacred to the Cherokee religion and a vital part of the Cherokee religious practices. The land includes several old Cherokee settlements and burial grounds with religious significance to the Cherokee people.

The plaintiffs contend that impoundment of the reservoir will violate their constitutional right to free exercise of their religion, in addition to their claimed statutory rights of access to lands of religious and historical significance. These statutory claims are based on the American Indian Religious Freedom Act, 42 U.S.C. § 1996; the National Historic Preservation Act, 16 U.S.C. §§ 470 et seq.; and the Tennessee cemetary statutes, Tenn.Code Ann. Sec. 46-401 et seq. TVA contends that impoundment will infringe none of the plaintiffs' legal rights.

## II. PLAINTIFFS' CLAIMED STATUTORY RIGHTS

The Congress and the President have authorized and directed TVA to impound the Tellico Reservoir "notwithstanding provisions of 16 U.S.C., Chapter 35 or any other law." (emphasis added). There is no question here that Congress has the power to make exceptions to rights either it or state legislatures have created by statute, as long as such exceptions are not invidiously discriminatory. Rather, plaintiffs contend that Congress has not exercised its power to exempt the Tellico project from the American Indian Religious Freedom Act, the National Historic Preservation Act, and the Tennessee cemetery statutes. Plaintiffs cite the law dis-

favoring implied repeal stated in TVA v. Hill, 437 U.S. 153, 189-190, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). However, this is not a case, like Hill, in which a general appropriations measure with no repeal or exception language of any kind is presented to the Court as an implied repeal of a specific statute. Instead, there is an expressed Congressional mandate to impound the Tellico Reservoir "notwithstanding ... any other law." There is nothing implied or ambiguous about this language and the law of implied repeal stated in Hill is inapposite.

Plaintiffs also cite, D. C. Federation of Civic Associations, Inc. v. Volpe, 140 U.S. App.D.C. 162, 434 F.2d 436 (D.C. Cir. 1970). In that case, the D.C. Circuit interpreted a Congressional mandate to complete construction of a highway project to be consistent with the procedural requirements of Title 23 of the United States Code. In so interpreting the Congressional language, the Court was merely trying to avoid the Constitutional issues presented by that case. Unfortunately, such a recourse is not available to this Court. The language exempting the Tellico Dam project from "any other law" is clear and explicit. The creation of a reservoir will necessarily prevent access to many of plaintiffs' sacred sites. If the statutes cited by plaintiffs do guarantee access to these sites, as argued by plaintiffs, they are unavoidably repugnant to Congress' order to complete the dam. Congress has clearly and expressly exempted the Tellico Reservoir from any law repugnant to its completion.

## III. CONSTITUTIONAL CLAIMS

Plaintiffs base their constitutional challenge to the Tellico Reservoir on the First, Fifth, and Ninth Amendments to the Constitution. The First Amendment guarantees the right to freely exercise one's religion. The Fifth Amendment, through the due process clause, guarantees equal protection of the law by the federal government. See, e.g., Schlesinger v. Ballard, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1974). The Ninth Amendment simply provides that the specification of certain rights in the Constitution shall not be construed to deny or disparage other rights retained by the people. Of course, Congress cannot exempt the Tellico project from any of these constitutional provisions. The Court assumes that the land to be flooded is considered sacred to the Cherokee religion and that active practitioners of that religion would want to make pilgrimages to this land as a precept of their religion.

Since the Ninth Amendment grants no substantive rights to plaintiffs, see Tanner v. Armco Steel Corp., 340 F.Supp. 532 (S.D. Texas, 1972), the complaint fails to state a cause of action under that amendment.

The real substantive issue in this lawsuit is whether the impounding of the Tellico Reservoir would infringe the free exercise clause of the First Amendment. An essential element to a claim under the free exercise clause is some form of governmental coercion of actions which are contrary to religious belief. Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); Board of Education v. Allen, 392 U.S. 236, 248-249, 88 S.Ct. 1923, 20 L.Ed.2d

1060 (1968); Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); Abington School District v. Schempp, 374 U.S. 203, 223, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961); Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961). This governmental coercion may take the form of pressuring or forcing individuals not to participate in religious practices. See, e.g. McDaniel v. Paty, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978). Other than preventing access to certain land, however, the impoundment of the Tellico Reservoir has no coercive effect on plaintiffs' religious beliefs or practices. The question thus becomes whether the denial of access to government-owned land considered sacred and necessary to plantiffs' religious beliefs infringes the free exercise clause. The federal government uses the land it owns for a wide variety of purposes, many of which require limiting or denying public access to the property. See e.g., Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972). The Court has been cited to no case that engrains the free exercise clause with property rights. The free exercise clause is not a license in itself to enter property, government-owned or otherwise, to which religious practitioners have no other legal right of access. Since plaintiffs claim no other legal property interest in the land in question, aside from the statutory claims previously discussed, a free exercise claim is not stated here.

This leaves only plaintiffs' equal protection argument. There is certainly nothing invidiously discriminatory about impoundment of a reservoir in itself. To state a colorable

equal protection claim the plaintiffs must allege that a denial of a right or benefit be invidiously discriminatory. Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963). This is not present here. As discussed previously, neither plaintiffs nor the general public have a right or interest in access to land merely because it is owned by the federal government. The flooding of the Little Tennessee will prevent everyone, not just plaintiffs, from having access to the land in question.

Defendant also raises defenses based on estoppel and laches. In light of the Court's disposition of the issues raised by plaintiffs, the Court need not decide these questions.

For the foregoing reasons, it is ORDERED that plaintiffs' motion for a preliminary injunction be, and the same hereby is, denied. It is further ORDERED that defendant's motion to dismiss be, and the same hereby is, granted.

Order Accordingly.